

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
BERIAM ORTIZ,

Index No.: 07 CIV  
10365

Plaintiff

v.

ERIN KATHLEEN BARLOW, TOYOTA MOTOR CREDIT,  
CORP. AND CAROL SHERMAN,

**NOTICE OF CROSS-  
MOTION FOR SUMMARY  
JUDGMENT**

**JUDGE ASSIGNED:  
HON. D. CHIN**

Defendants

-----x

MOTION BY: Defendant, Carol Sherman

DATE and TIME: To be assigned by the Court

PLACE: UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK, 500 Pearl Street  
New York, New York 10007-1312

SUPPORTING PAPERS: Affirmation of John R. Marquez, Affidavit  
of Carol Sherman, and Memorandum of Law  
with attachments thereto.

RELIEF DEMANDED: (a) An order granting Summary Judgment  
pursuant to FRCP 56, and dismissing  
the Complaint and any and all cross  
claims.

(b) Such other and further relief as this Court deems just and proper.

DATED: White Plains, New York  
May 19, 2008

Yours, etc.,  
EUSTACE & MARQUEZ  
Attorneys for Defendant, Carol  
Sherman  
Office and Post Office Address  
1311 Mamaroneck Avenue  
3rd Floor  
White Plains, New York 10605  
(914) 989-6650

By:   
John R. Marquez-3623

TO:

Jay S. Hausman & Associates, PC.  
Attorneys for Plaintiff,  
Beriam Ortiz  
280 North Central Avenue  
Hartsdale, New York 10530  
(914) 946-3344

Loretta J. Hottinger, Esq.  
Attorneys for Co-Defendant,  
Erin Kathleen Barlow  
17 State Street, 25th Floor  
New York, New York 10004  
(212) 809-4800

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BERIAM ORTIZ,

Index No.: 07 CIV  
10365

Plaintiff

v.

**AFFIRMATION IN  
SUPPORT**

ERIN KATHLEEN BARLOW, TOYOTA MOTOR CREDIT,  
CORP. AND CAROL SHERMAN,

Defendants

-----x

John R. Marquez, an attorney duly admitted to practice law  
in the United States District Court for the Southern District of  
New York, affirms the following under the penalties of perjury:

1. I am a member of the firm of EUSTACE & MARQUEZ,  
attorneys for the Defendant, Carol Sherman.
2. I am familiar with all of the pleadings and  
proceedings in this matter and I make this affirmation in  
support of the within motion for an Order granting Defendant  
Carol Sherman Summary Judgment and dismissing the Complaint and  
any and all Cross Claims and for such other relief as the Court  
may deem just and proper.
3. This is an action for personal injuries sustained to  
Plaintiff Beriam Ortiz in a motor vehicle accident.
4. This action was commenced against Defendant Carol  
Sherman by filing of Summons and Complaint on or about October  
9, 2007. Issue was joined by service of a Verified Answer by

Defendant Carol Sherman on or about November 12, 2007. (See Exhibit "A and B", Pleadings, attached to Plaintiff's Notice of Motion, dated April 18, 2008).

5. Affirmant refers the Court to the documents attached to Plaintiff's Notice of Motion: the Notice of Removal (Exhibit "C"), and Police Accident Report (Exhibit "F").

6. Attached hereto is the Affidavit of Carol Sherman attesting to her knowledge of the motor vehicle accident that is the basis of this lawsuit. (See, Affidavit Exhibit "A").

7. Ms. Sherman's car was struck in the rear while traveling with slow moving traffic on the Bruckner Expressway, Bronx, N.Y.

8. As attested by Plaintiff Beriam Ortiz, after Ms. Ortiz's vehicle was struck in the rear by Defendant Erin Barlow's vehicle, Ms. Ortiz's vehicle struck Carol Sherman's vehicle in the rear. (See, Ortiz Affidavit attached to Plaintiff's Motion as Exhibit "E").

9. Defendant Sherman did not cause the accident between the Ortiz and Barlow vehicles, and therefore should not be a party to this action.

10. Based upon the above recitations, the Affidavit of Ms. Sherman, The Affidavit of Beriam Ortiz, as well as the annexed Memorandum of Law and accompanying exhibits, it is respectfully requested that the Court issue an Order, pursuant to FRCP 56,

granting Defendant Carol Sherman summary judgment and dismissing Plaintiff's Complaint, and for such other and further relief as this Court deems just and proper.

WHEREFORE, it is respectfully requested that the Court issue an Order granting the within motion for Summary Judgment and dismissing the Plaintiff's Complaint, and for such other and further relief as this Court deems just and proper.

DATED: May 19, 2008  
White Plains, New York

  
John R. Marquez-3623

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
BERIAM ORTIZ,

Index No.: 07 CIV  
10365

Plaintiff

v.

ERIN KATHLEEN BARLOW, TOYOTA MOTOR CREDIT,  
CORP. AND CAROL SHERMAN,

**MEMORANDUM OF LAW IN  
SUPPORT OF CROSS-  
MOTION FOR SUMMARY  
JUDGMENT**

Defendants

-----x

**PRELIMINARY STATEMENT**

This Memorandum of Law is submitted in support of the Cross-Motion by Defendant, Carol Sherman for an Order of Summary Judgment and a dismissal of the Complaint and any and all cross claims, and for such other and further relief as this Court deems just and proper.

**QUESTION PRESENTED**

**WHETHER DEFENDANT CAROL SHERMAN, WHILE TRAVELLING WITH TRAFFIC ON THE BRUCKNER BOULEVARD EXPRESSWAY IS LIABLE TO ANY PARTY IN THIS LITIGATION AS A RESULT OF BEING STRUCK IN THE REAR BY PLAINTIFF BERIAN ORTIZ AFTER THE ORTIZ'S VEHICLE WAS STRUCK BY DEFENDANT ERIN KATHLEEN BARLOW**

**IT IS RESPECTFULLY SUBMITTED THAT THIS QUESTION SHOULD BE ANSWERED IN A NEGATIVE.**

**STATEMENT OF FACTS**

Defendant Carol Sherman adopts the facts as stated by Plaintiff in her Memorandum of Law in support of Plaintiff's Motion for Partial Summary Judgment on Liability.

**ARGUMENT**

Defendant Carol Sherman adopts those arguments made by Plaintiff Berian Ortiz to the extent that they also apply to Defendant Carol Sherman.

In this litigation, Carol Sherman's vehicle was struck in the rear as she was proceeding with traffic on the Bruckner Boulevard Expressway.

Pursuant to Vehicle and Traffic Laws §1129(a) a driver is required to maintain a safe distance between vehicles and shall not follow another vehicle more closely than is reasonable and prudent. As cited in Plaintiff's Memorandum of Law, the failure to maintain a safe distance between vehicles constitutes negligence as a matter of law in the absence of a non-negligence explanation. See, Lifshits v. Variety Poly Bags, 278 A.D.2d 372 (2d Dep't 2000); Power v. Hupert, 260 A.D.2d 458 (2d Dep't 1999), Johnson v. Phillips, 261 A.D.2d 269 (1<sup>st</sup> Dep't 1999).

Defendant Sherman's action in driving her vehicle in slow moving traffic did not cause contact to be made by Plaintiff's vehicle with Defendant Barlow's vehicle. Further, Plaintiff Ortiz affirms in her Affidavit, attached to her moving papers, that after her vehicle was struck in the rear by Defendant Barlow's vehicle, her vehicle was caused to be pushed into Defendant Sherman's vehicle. There is no evidence put forward by any party that Defendant Sherman was negligent and that her

negligence was the proximate cause of the accident between Plaintiff and Co-Defendant Barlow.

**CONCLUSION**

An Order should be entered, pursuant to FRCP 56, granting Defendant, Carol Sherman Summary Judgment and a dismissal of plaintiff's Complaint and any and all Cross Claims, and for such other and further relief as this Court deems just and proper.

DATED: White Plains, New York  
May 19, 2008

Yours, etc.,

EUSTACE & MARQUEZ  
Attorneys for Defendant,  
Carol Sherman  
Office and Post Office Address  
1311 Mamaroneck Avenue  
3rd Floor  
White Plains, New York 10605  
(914) 989-6650

By:   
John R. Marquez - 3623

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
BERIAM ORTIZ,

Index No.: 07 CIV  
10365

Plaintiff

v.

**AFFIDAVIT OF SERVICE**

ERIN KATHLEEN BARLOW, TOYOTA MOTOR CREDIT,  
CORP. AND CAROL SHERMAN,

Defendants

-----x  
STATE OF NEW YORK )  
ss.  
COUNTY OF WESTCHESTER )

Linda McKeiver, being duly sworn, deposes and says:

1. That I am over the age of eighteen years and not a party to this action.
2. That on May 19, 2008, I served upon:

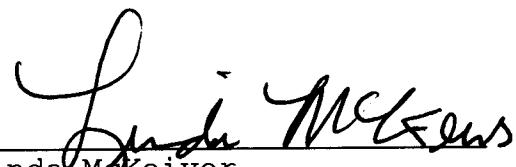
Jay S. Hausman & Associates, PC.  
Attorneys for Plaintiff,  
Beriam Ortiz  
280 North Central Avenue  
Hartsdale, New York 10530  
(914) 946-3344

Loretta J. Hottinger, Esq.  
Attorneys for Co-Defendant,  
Erin Kathleen Barlow  
17 State Street, 25th Floor  
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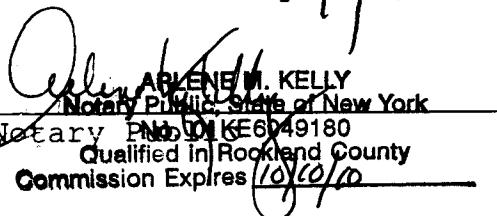
a true copy of the annexed **NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT WITH AFFIRMATION IN SUPPORT AND MEMORANDUM OF LAW** by depositing them endorsed in a postpaid properly addressed wrapper, in a post office or, official depository under the exclusive care and custody of the United States Postal Service within the State of New York, at the address designated by him

or her upon the last paper served by him or her in the action.

DATED: May 19, 2008  
White Plains, New York

  
\_\_\_\_\_  
Linda McKeiver

Sworn and subscribed  
before me on May 19, 2008

  
\_\_\_\_\_  
ARLENE M. KELLY  
Notary Public, State of New York  
Notary Pub. # NKE6049180  
Qualified in Rockland County  
Commission Expires 10/20/10

Index No.: 07 CIV 10365

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BERIAM ORTIZ,

Plaintiff

against

ERIN KATHLEEN BARLOW, TOYOTA MOTOR CREDIT, CORP. AND  
CAROL SHERMAN,

Defendants

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**NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT  
WITH AFFIRMATION IN SUPPORT**

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**EUSTACE & MARQUEZ**  
Attorneys for Defendant  
**Carol Sherman**  
Office and Post Office Address  
1311 Mamaroneck Avenue  
3rd Floor  
White Plains, New York 10605  
(914) 989-6650

**EXHIBIT “A”**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

BERIAM ORTIZ,

Index No.: 07 CIV  
10365

Plaintiff

## **AFFIDAVIT**

v.

**JUDGE ASSIGNED:**  
**HON. D. CHIN**

ERIN KATHLEEN BARLOW, TOYOTA MOTOR CREDIT,  
CORP. AND CAROL SHERMAN,

## Defendants

Carol Sherman, being duly sworn deposes and states:

1. I am a Defendant in the above-captioned matter.
2. On April 20, 2007 at approximately 5:00 p.m. I was a driver of a 2006 Lexus automobile on the Bruckner Boulevard Expressway, located in the Bronx, New York.
3. As I was driving in slow moving traffic, I heard the sound of a car(s) crash somewhere behind my vehicle.
4. Approximately two or three seconds later, my vehicle was struck in the rear.
5. When my vehicle was struck in the rear I was not stopped, but moving forward in slow moving traffic.

6. At the time I heard the initial sound made by car(s) crashing somewhere behind me, I was not stopped, but moving forward in slow moving traffic.

7. After my vehicle was struck I exited my car and observed the vehicle that struck mine. The driver was a barefooted woman.

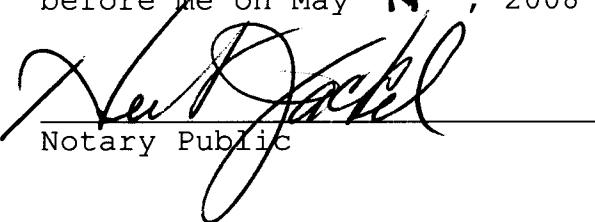
8. I also observed the driver of the vehicle that struck the vehicle behind mine.

9. The driver of that vehicle stated she was looking at her atlas and did not see the vehicle in front of her.

10. I understand from my attorneys, Eustace & Marquez that this Affidavit will be used in a motion seeking dismissal of this lawsuit against me and I support such a motion.

  
Carol Sherman

Sworn and subscribed  
before me on May 14, 2008

  
\_\_\_\_\_  
Notary Public

